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No. 834 96

IN THE

Supreme Court of the United States

GUY A. THOMPSON, TRUSTEE, INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, *Petitioner*,

v.

AMERICAN ABRASIVE METALS COMPANY, *Respondent*

On Petition for Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas, and Supporting Brief

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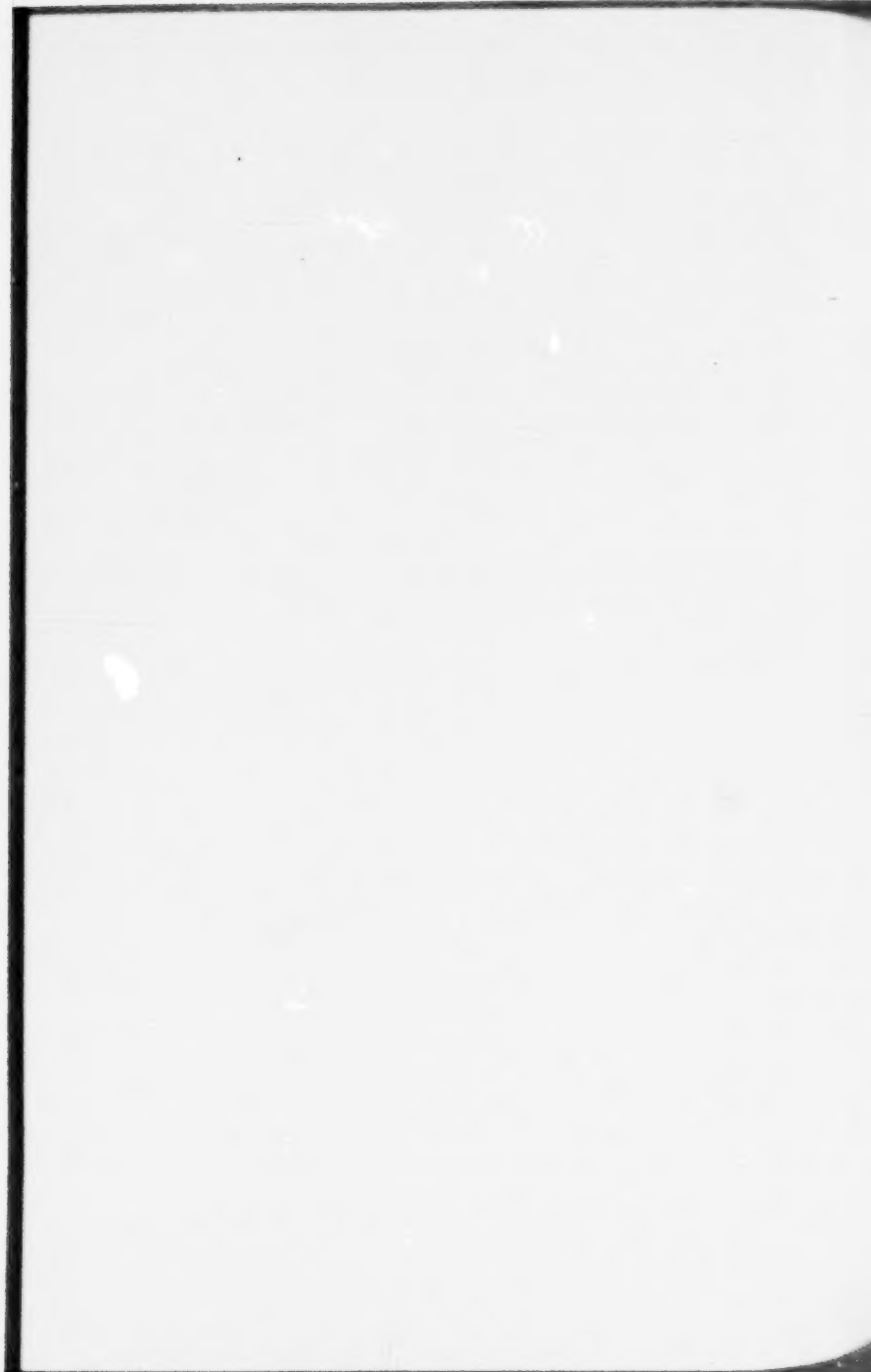

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Statement of the Nature and Result of the Suit

This is a suit brought in the District Court of Harris County, Texas, by the American Abrasive Metals Company, a New York Corporation, as owner, against Guy A. Thompson, Trustee, of the International-Great Northern Railroad Company and other railroads for damages to four hundred eighty (480) kits of liquid paint (and another shipment not pertinent to this appeal) which it delivered on April 3, 1944, to Morgain Forwarding Company at Newark, New Jersey (later and now known as Premier Car-Loading Company), which company was a forwarder of freight in interstate commerce, for transportation by it

as a forwarder over common carrier railroads to Houston, Texas.

All of the facts of the suit were stipulated (Tr. pp. 15-36, inclusive) and may be summarized as follows:

At the time the paint was delivered to the Morgain Forwarding Company, that company issued its bill of lading to Respondent naming Respondent as shipper and thereby agreed to transport and deliver said paint to Houston, Texas. The Morgain Forwarding Company then consolidated Respondent's shipment (which was less than a carload lot) with various other of its customers shipments and made up a carload lot of mixed merchandise, which carload lot of mixed merchandise was delivered by the Morgain Forwarding Company in good condition and properly prepared for shipment at Newark, New Jersey, to the Baltimore & Ohio Railroad Company, which railroad on April 4, 1944, issued to the freight forwarder, Morgain Forwarding Company, its uniform straight bill of lading in which the Morgain Forwarding Company was named as both the shipper and consignee evidencing said railroad's agreement for the transportation thereof over its own lines and lines of connecting carriers and delivery to said forwarder at Houston, Texas. A copy of said bill of lading was attached to the Stipulations of Fact filed in the trial court and is contained in the transcript pages 22 to 36 inclusive. This bill of lading was the only contract of carriage entered into by any of the railroad carriers relative to the shipment in question.

The shipment of paint was contained in a car which moved from Pier No. 22, North River, New York City, New York, on April 4, 1944, consigned to the Morgain Forwarding Company at Houston, Texas, and was subject to the provisions of the tariffs of the Baltimore & Ohio Railroad Company and connecting carriers, including Ap-

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pellant. Freight charges were paid by the Morgain Forwarding Company on said carload shipment, including the paint belonging to Respondent. The amount of the freight charges was the reduced rate applicable to a carload lot as specified in the tariffs since the said Forwarding Company did not elect to pay the higher rate to have a common carrier's liability service "limited only as provided by common law and the laws of the United States and of the several states insofar as they apply" as provided in Rule 1 of Consolidated Freight Classification No. 16 (Western Classification No. 71) on file with the Interstate Commerce Commission and in effect at the time this shipment moved. (Tr. pp. 17-20, inclusive).

The paint was damaged during transportation on the line of Petitioner, the delivering carrier. The actual owner of the paint was unknown to each of the carrier railroads, including Petitioner, until written claim for damages to Respondent's paint was timely filed by the Premier Car-Loading Corporation, successor to the Morgain Forwarding Company, with Petitioner, naming Respondent as the owner of said paint. (Tr. pp. 36-38, inclusive).

Petitioner in his First Amended Original Answer pleaded a general denial of the cause of action and asserted that by reason of the facts surrounding the shipment as above related, the Respondent being one individual owner of a part of the carload shipment of mixed merchandise, moving on a uniform straight bill of lading issued by the receiving carrier to the freight forwarder, Morgain Forwarding Company, and showing thereon the freight forwarder to be both shipper and consignee of the carload lot, had no right of action against Petitioner for the damage done to the paint during transportation of the same by rail. (Tr. pp. 11-15, inclusive). The cause came on for trial without the aid of a jury and the trial court entered judgment in favor

of Respondent and against Petitioner for the sum of Six Thousand Four Hundred Thirty-four & 38/100 ($6,434.38) Dollars, to which judgment and ruling of the Court duly excepted and gave notice of appeal. The Court of Civil Appeals for the First Supreme Judicial District of Texas, Galveston, Texas, affirmed the decision of the trial court (see opinion of the court Tr. pp. 49-54, inclusive and Appendix A of supporting brief annexed hereto at page 25, opinion reported at 253 S.W. 2d 83). Petitioner's Motion for Rehearing was refused by the Court of Civil Appeals. (Tr. page 59). Application for a writ of error was refused by the Supreme Court of Texas and Motion for Rehearing was overruled by said court on March 4, 1953. (Tr. p. 60). Appropriate bond was filed with the Court of Civil Appeals in connection with this petition for Writ of Certiorari (Tr. 64 to 65, inclusive) and upon motion of petitioner, the court's mandate to the trial court was recalled and the proceedings ordered stayed. (Tr. p. 66).

Jurisdictional Statements

The Supreme Court of the United States has jurisdiction to review the proceedings in this case under Title 28, Section 1257, Subsection (3), U. S. CODE ANNOTATED, in that the decision of the State Court in construing the provisions of Part IV of the Interstate Commerce Act, 49 USCA, Section 1001, et seq. (Freight Forwarder's Act), has decided a federal question of substance not heretofore determined by this Honorable Court and in a manner as to deny to petitioner the rights, privileges and immunities specially provided by said Act. ATSF v. ROBINSON (Oklahoma 1914), 233 U.S. 173, 58 L. Ed. 901, 34 Sup. Ct. Rep. 556; CLEVELAND CC & ST. L. R. Co. v. DETTLEBACH (Ohio 1916), 239 U.S. 588, 60 L. Ed. 453; M.K.T. RR.

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Co. v. HARRIMAN, 227 U.S. 657, 672, 57 L. Ed. 690, 698, 33 Sup. Ct. Rep. 397).

Petitioner in the trial court, by his first amended original answer pleaded a general denial of the cause of action asserted by respondent. (Tr. 11-14, inclusive). On appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, petitioner presented six detailed points raising the basic federal question here presented (see opinion of the attached Tr. p. 50 and Appendix A, page 26 of supporting brief), of whether under the provisions of Part IV of the Interstate Commerce Act, 49 USCA, Section 1001, et seq., commonly known as the Freight Forwarder's Act, passed by Congress in 1942, a less than carload shipper who holds a bill of lading from a freight forwarder whereby the forwarder agrees to cause said merchandise to be transported and delivered to a given destination, can recover directly from the underlying rail carrier for loss or damage to said merchandise while the same is a part of carload shipment made up of a number of individual less than carload shipments and covered by a single railroad bill of lading issued in favor of the forwarder as shipper and showing the forwarder to be both consignor and consignee. The Court of Civil Appeals answered this question in the affirmative and allowed the recovery against petitioner in the trial court to stand. Petitioner's Motion for Rehearing in said court (Tr. pp. 55 to 58, inclusive), again raised by detailed grounds of error the basic federal question here presented as above related which motion was overruled. Under the Rules of Civil Procedure of the State of Texas, the grounds of error detailed in petitioner's Motion for Rehearing in the Court of Civil Appeals was the basis of his application to the Supreme Court of Texas for a Writ of Error. That Court by refusing said application for Writ of Error and overruling petitioner's subsequent Motion for

Rehearing, has approved the opinion of the Court of Civil Appeals.

The federal question involved is substantial, in that the decision of the Court of Civil Appeals ignores the intention of Congress when it passed Part IV of the Interstate Commerce Act that under the facts here presented, a less than carload shipper through a freight forwarder can look ONLY to such freight forwarder for the recovery of any damage to said shipment and not to the underlying rail carrier and thereby has created an undue and unreasonable burden on interstate commerce in permitting as many different suits against the rail lines as there were outstanding bills of lading of the forwarder to its customers and permits such less than carload shippers, who are complete strangers to the contract of carriage between the freight forwarder and the rail carrier, to recover against the rail carrier.

Questions Presented

Each of the following questions involving the construction of Part IV of the Interstate Commerce Act, 49 USCA, Section 1001, et seq., was duly and timely presented to the Court of Civil Appeals of the First Supreme Judicial District of Texas, Galveston, Texas, and to the Supreme Court of Texas and answered adversely to petitioner.

First

Whether the Court of Civil Appeals erred in refusing to sustain Petitioner's First Point that under the provisions of Part IV of the *Interstate Commerce Act* (Freight Forwarders Act), 49 USCA, Sec. 1001 et seq., the individual shipper of a less than carload lot through a freight forwarder has no right of action against the underlying rail carriers for

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damages done to said shipment during the course of the transportation thereof.

Second

Whether the Court of Civil Appeals erred in refusing to sustain Petitioner's Second Point that under the provisions of Part IV of the *Interstate Commerce Act* (Freight Forwarders Act), 49 USCA, Sec. 1001 et seq., a less than carload shipper who holds a freight forwarder's bill of lading, cannot recover directly against an underlying rail carrier under a bill of lading issued by the receiving carrier to the freight forwarder covering a carload shipment made up of a number of less than carload shipments, including that of a particular shipper, the freight forwarder being named in said bill of lading as both consignor and consignee.

Third

Whether the Court of Civil Appeals erred in refusing to sustain Petitioner's Third Point to the effect that since the shipper and consignee named in the bill of lading issued by the receiving carrier was the Morgain Forwarding Company, the owner of a less than carload portion of said carload shipment has no right of action against the underlying carrier under Part IV of the *Interstate Commerce Act.*

Fourth

Whether the Court of Civil Appeals erred in refusing to sustain Petitioner's Fourth Point which was as follows:

The shipment made by the Morgain Forwarding Company, the freight forwarder, which included the Respondent's paint, was a carload shipment made subject to the terms and provisions of the bill of lading, to the tariffs of the carriers on file with the Interstate Commerce Commission and to the provisions of Consolidated Freight Classification No. 16, and was made at the reduced rate specified, and accordingly said shipment was subject to the terms and provisions of said uniform bill of lading, the shipper, Morgain Forwarding Company, not having paid a higher rate to obtain the protection of common law liability, and accordingly, the fractional owner of a part of said carload shipment has no direct cause of action against the underlying rail carriers.

Fifth

Whether the Court of Civil Appeals erred in refusing to sustain Petitioner's Fifth Point that under the provisions of Part IV of the *Interstate Commerce Act* (Freight Forwarders Act), 49 USCA, Sec. 1001 et seq., a less than carload shipper by freight forwarder can recover damages for loss or damage to said shipment only from the freight forwarder and not from any underlying rail carrier.

Sixth

Whether the Court of Civil Appeals erred in refusing to sustain Petitioner's Sixth Point which was as follows:

The judgment of the District Court granting Respondent a recovery against Appellant for damage

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to a less than carload shipment moving through a freight forwarder on a uniform bill of lading issued by the receiving carrier to said freight forwarder covering a carload shipment in which the freight forwarder is named as both consignor and consignee denies to Appellant the rights, privileges and immunities specially provided by Part IV of the *Interstate Commerce Act* (Freight Forwarders Act), 49 USCA, Sec. 1001 et seq.

Reason Relied On For The Allowance Of A Writ of Certiorari

The basic federal question presented by this petition as detailed under the jurisdictional statements above is one that requires a construction by this honorable court of the provisions of Part IV of the INTERSTATE COMMERCE ACT, 49 USCA, Section 1001, et seq., commonly known as the Freight Forwarder's Act passed by Congress in 1942. It is petitioner's contention that it was the intention of Congress when it passed said Act that a less than carload shipper through a freight forwarder can look only to such freight forwarder for the recovery of any subsequent damage to the shipment while in the hands of the underlying carrier and he may not look directly to the underlying rail carrier for the recovery of such damage. All of the points of error detailed above will be treated in petitioner's brief which is attached hereto as presenting the one basic federal question. The Court of Civil Appeals for the First Supreme Judicial District of Texas in permitting such a recovery against the underlying rail carrier has denied to petitioner the rights, privileges and immunities specially provided by the said Forwarders Act. While recognizing that prior to the passage of the Freight Forwarders Act, the courts allowed less than car load shippers through a freight forwarder to recover

directly from the carrier, it is petitioner's contention that the Freight Forwarders Act in prescribing regulations covering such operations eliminated, such a right of recovery against the underlying carrier.

WHEREFORE, petitioner prays that this petition for Writ of Certiorari be granted and that upon final hearing the judgments of the trial court and the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, Texas, be reversed and judgment be here rendered for the petitioner.

Respectfully submitted,

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Counsel for Respondent, Vinson, Elkins & Weems, Niels Esperson Building, Houston, Texas, have been furnished duplicate copies of this petition for Writ of Certiorari and copy of certified transcript from the Court of Civil Appeals, First Supreme Judicial District of Texas, at Galveston, Texas, on this the 26th day of May, A. D. 1953.

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BRIEF OF PETITIONER

Opinion of the Court Below

The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, set out in full in Appendix "A" of this brief, is reported at 253 S.W. 2d 83.

Grounds of Jurisdiction

The Supreme Court of the United States has jurisdiction of the case upon the basis set forth in the Petition, which is adopted here.

Statement of the Case

This case involves the construction of the provisions of Part IV of the INTERSTATE COMMERCE ACT, 49 USCA,

Section 1001, et seq., (Freight Forwarders Act). The opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas has decided a federal question of substance not heretofore determined by this Honorable Court in permitting recovery by a less than carload shipper who holds a bill of lading from a freight forwarder, whereby the forwarder agrees to cause said merchandise to be transported and delivered to a given destination from the underlying rail carrier for loss or damage to said merchandise, while the same is a part of carload shipment made up of a number of individual less than carload shipments and covered by a single railroad bill of lading issued in favor of forwarder as shipper and showing the forwarder to be both consignor and consignee, which holding denies to petitioner the rights, privileges and immunities specially provided by the Freight Forwarders Act.

Questions Presented

All of the questions presented as detailed in the Petition are adopted here.

Summary

All of the questions presented will be briefed and considered together since they may be reduced to the basic question of whether under the provisions of Part IV of the INTERSTATE COMMERCE ACT, 49 USCA, Sec. 1001, et seq., commonly known as the Freight Forwarders Act, passed by Congress in 1942, a less than carload shipper who holds a bill of lading from a freight forwarder whereby the forwarder agrees to cause said merchandise to be transported and delivered to a given destination, can recover directly from the underlying rail carrier for loss or damage to said merchandise while the same is a part of a carload shipment

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made up of a number of individual less than carload shipments and covered by a single railroad bill of lading issued in favor of forwarder as shipper and showing the forwarder to be both consignor and consignee.

Argument

Before Congress passed the Freight Forwarders Act where goods were shipped through a forwarder, the courts allowed the shippers to recover directly from the carrier. In the early decision of NEW JERSEY STEAM NAVIGATION CO. v. MERCHANTS BANK, 6 How. 344, 379, 381, 12 L. Ed. 465 (1848), a bank which shipped through a person who performed the functions of what today is a freight forwarder was permitted to recover directly from the carrier under the theory of undisclosed principal. In a later case of GREAT NORTHERN RAILWAY CO. v. O'CONNOR, 232 U.S. 508, 509, 34 S. Ct. 380, 58 L. Ed. 703, a shipper through a forwarder was permitted to recover directly against the railroad, the Supreme Court apparently deciding the case on the theory of agency.

The most recent decision of the United States Supreme Court discussing the Freight Forwarder Act is that of CHICAGO, M. ST. P. & PAC. R. CO. v. ACME FAST FREIGHT, 336 U.S. 46. The opinion by Mr. Chief Justice Vinson points out that Part IV of the INTERSTATE COMMERCE ACT, "was designed to define freight forwarders, to prescribe certain regulations covering forwarder operations, and to bring this essential transportation business within the control of the Interstate Commerce Commission * * *

> "Freight forwarders consolidate less than carload freight into carloads for shipment by rail, truck or water. Their charges approximate rail less than carload rates; their expenses and profits are derived from the

spread between the carload and l.c.l. rates. Forwarders are utilized by l.c.l. shipper because of the speed and efficiency with which they handle shipments, the unity of responsibility obtained, and certain services which forwarders make available.

"Forwarders are required by Section 413 of the Act, 49 USC, Section 1013, to issue bills of lading to their customers, covering the individual package shipment from time of receipt until delivery to the ultimate consignee. When the freight is consolidated into carloads, the railroad gives the forwarder its bill of lading in which the forwarder is designated as both consignor and consignee. The contents are noted as 'one carload of mixed merchandise' and usually move under an 'all-commodity' carload rate. The destination set out in the railroad bill of lading is the forwarder's break-bulk point. At that point the carload is broken up; some shipments may be distributed locally, some sent by truck to off-line destinations, and some consolidated into carloads for reshipment to further break-bulk points. The railroad has no knowledge of the contents of the car, the identity of the individual shippers, or the ultimate destinations of the consignments. The forwarder has an unqualified right to select the carrier and route for the transportation of the freight.

"The forwarder thus has some of the characteristics of both carrier and shipper. In its relations with its customers, a forwarder is subjected by the Act to many of the requirements and regulations applicable to common carriers under Parts I, II, and III of the Act. In its relations with these carriers, however, the status of the forwarder is still that of shipper. It is this duality of character that raises the question in this case.

"Section 1013 of the Act provides that the Carmack Amendment (June 29, 1906) 34 Stat. 584, 593, c 3591, as amended, 49 USCA Section 20 (11) and (12), 10 FCA title 49, Sections 20 (11) and (12), shall apply to freight forwarders 'in the case of service

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> subject to this chapter' (Part IV), and that the freight forwarder shall be deemed both the receiving and delivering transportation company for the purposes of such Section 20 (11) and (12). Incorporation of the Carmack Amendment requires, as has been noted, that the forwarder issue bills of lading to its shippers, covering transportation of the individual shipments to their ultimate destinations. *There can be no question but that under Section 20 (11), the forwarder is liable to its shipper for loss or damage to the freight exactly as if it were an initial carrier* subject to Parts I, II, and III."

In the ACME case Mr. Chief Justice Vinson distinguishes forwarders under the Act from those which formerly contracted as mere agents of the shipper by reason of which relationship shippers were therefore permitted to recover directly against the railroads. See MERCHANTS BANK AND O'CONNOR cases, supra. At pages 484-485 of the opinion in the ACME case it is stated:

> "The term was originally applied to persons who arrange for the transportation by common carrier of the shipper's goods. The forwarder did not necessarily consolidate the individual consignments into carload lots, and its duties, as agent of the shipper, went no farther than procuring transportation by carrier and handling the details of shipment. Forwarders of this type charged fees for their services, which the shipper paid in addition to the freight charges of the carrier utilized for the actual transportation.
>
> "Later, a different type of forwarding service was offered. This forwarder picked up the less than carload shipment at the shipper's place of business and engaged to deliver it safely at its ultimate destination. The freight forwarder charged a rate covering the entire transportation and made its profit by consolidating the shipment with others in carload quantities to take advantage of the spread between carload and l.c.l rates.

It held itself out not merely to arrange with common carriers for the transportation of the goods, but rather to deliver them safely to the consignee. The shipper seldom if ever knew which carrier would be utilized in the carriage of his shipment.

* * *

"The Freight Forwarder Act encompasses only the second type of forwarder described above. Section 1002 (a) (5) defines 'freight forwarder' as

"Any person which * * * holds itself out to the general public to transport or provide transportation of property * * * and which, in the ordinary and usual course of its undertaking, (A) assembles and consolidates or provides for assembling and consolidating shipments of such property, and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, and (B) *assumes responsibility for the transportation of such property from point of receipt to point of destination,* and (C) utilizes, for the whole or any part of the transportation of such shipments, the services of a carrier or carriers subject to chapters 1, 8, or 12 of this title." (Emphasis added.)

Thus it is that the type of freight forwarder encompassed by the Freight Forwarders Act does not act as the mere agent of the shipper as under the early decisions but as an *independent contractor* or *principal.* When the Morgain Forwarding Company, in the case at bar, contracted with the Baltimore & Ohio Railroad Company for shipment of a carload lot of mixed merchandise to Houston, Texas, it did so not as an agent of the several unnamed and undisclosed less than carload shippers, including Respondent in this case, but as a PRINCIPAL. As indicated by Chief Justice Vinson in the ACME case noted hereinabove the forwarder under the Act operates free from any control of the

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l.c.l. shipper as to choice of a carrier, be it rail or water—the undertaking being to transport the goods and deliver them safely to the consignee.

> "The underlying carrier haul involves a different shipment, a different consideration, a different origin, a different destination and a different consignor and consignee than are involved in the forwarder's undertaking." (Page 480 of the Acme decision.)

The freight forwarder contract being so materially different from the undertaking by the rail line and the shipper not having the right to control the forwarder's contract with the rail line, the relationship of an undisclosed principal or agency by the freight forwarder and the l.c.l. shipper simply does not exist. The individual shippers contract with the freight forwarder for complete receipt, transportation and delivery; the freight forwarder is always available for suit and for the purpose of filing claims. There is absolutely no privity of contract in this case between the railroad and the Respondent and it seems clear that Congress intended when it enacted the freight forwarder act that the freight forwarder is the only person to which an l.c.l. shipper is entitled to look for recovery of damages for loss or damage to his goods. The railroad would have no right whatever to proceed against the owners of the individual shipments contained in the carload for the collection of freight charges due from the freight forwarder or to collect any undercharges which might be due on the shipments. The railroad's remedy would be solely against the freight forwarder which was both shipper and consignee in the bill of lading. The owner of individual shipments should accordingly not be permitted to proceed against the carriers for any alleged loss or damage to any individual shipment contained in the carload lot.

This is emphasized by the comments of Congressman Wolverton, the ranking minority member of the House Committee, in charge of the Bill which later became Part IV of the INTERSTATE COMMERCE ACT who spoke in behalf of the Bill in the House of Representatives on October 23, 1941, and presented the only detailed explanation of the intended construction to be given the Act. His statement which is quoted with approval by Chief Justice Vinson in the ACME case at Page 474 of the opinion is as follows:

> "In some respects the report which accompanies this bill is not as complete as it might be. Due to limitations of time, the report was not submitted to the members of the committee or sub-committee, and therefore it may not be out of place to include in these remarks some further explanations which may be helpful to the Members in their consideration of the measure. In a few instances, which will be mentioned later, the report may not be so phrased as to convey fully the sense of what was intended."

That he had Section 1013 specifically in mind is clearly shown by his remarks explaining that section:

> "In its explanation of section 413 (Section 1013), the report which accompanied the bill is not strictly accurate in interpreting the intended legal effect of making section 20 (11) and (12) of part I applicable to freight forwarders. **It should be understood that, in so far as a given service to its shipper is covered by the published rate of a freight forwarder, the latter is the only person to which such shipper is entitled to look for recovery of damages,** and it is in this sense that the forwarder is to 'be deemed both the receiving and delivering transportation company.' If damage to a shipment occurs on the line of a common carrier whose services are

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> being utilized by the forwarder, the forwarder has no right of subrogation under section 20 (12), *since its own shipper never had any right of action against such carrier.* The forwarder's recovery against the carrier would be upon the bill of lading issued to it by such carrier and under the provisions of law applicable thereto. The reference to paragraph (12) of section 20 was included in section 413 (Section 1013) to cover a combination of services performed directly for the owner of the goods, such as would occur where the services of two or more forwarders were involved."

The trial court's judgment in this case and the opinion of the Court of Civil Appeals were predicated upon what Petitioner conceives to be a false interpretation given to the language used by Chief Justice Vinson in Foot Note 27 of the ACME FAST FREIGHT case, supra. The particular question involved in the case at bar was neither briefed or argued in the ACME case and, therefore, Foot Note 27 which discusses the question is purely obiter.

In Foot Note 17 of the Circuit Court of Appeals decision in the ACME case (166 Fed. 2d 778, at page 783, Circuit Judge Frank apparently quoted with approval from the House Committee Report with respect to Section 1013 of the FREIGHT FORWARDERS ACT). Mr. Chief Justice Vinson in the Supreme Court opinion in the ACME case disposed of this House Committee Report in the following language:

> "A report not previously submitted to members of the committee and expressly contradicted without challenge on the floor of the House by a ranking member of the Committee can hardly be considered authoritative."

Judge Frank then quoted a portion of Representative Wolverton's statement, explaining the bill made on the floor of the House as it appears herebefore in this brief and then stated:

> "We think that Representative Wolverton's premise, i.e., that a shipper would have no cause of action against the carrier was in error and therefore his conclusion was unsound. We do not think, therefore, that an interpretation of the Act can be based upon it especially as he was not Chairman of the Committee."

Foot Note 27 of the Supreme Court's opinion which in itself, as before indicated, is purely obiter in the light of the issue involved in the ACME case, was intended to answer this Foot Note 17 to the Circuit Court of Appeals Decision. Chief Justice Vinson in this Foot Note stated:

> "The Court of Appeals rejected Rep. Wolverton's analysis of Section 1013 as based on the erroneous premise that the shipper by freight forwarder never had any right of action against the carrier, and therefore the forwarder can have no right of subrogation under Section 20 (12). The court felt that this rationale indicates a withdrawal of the shipper's common law right of recovery against the responsible carrier, and consequently, the placing of the forwarder in the position of an insurer with no right against the carrier responsible for loss or damage. * * * It has no need for subrogation to the shipper's right, as Rep. Wolverton indicated. Its recovery against the carrier has always been upon 'the bill of lading issued to it by such carrier and under the provisions of law applicable thereto'. That right remains."

In effect Chief Justice Vinson is saying that Judge Frank was in error in assuming that the right of the forwarder against the rail line must depend upon its subrogation to the rights of the owner of the shipment, since under the Act and as so held in the ACME decision, the *forwarder* is the *shipper* and the question of ownership of the shipment is of no importance.

It is true that in this Foot Note, Chief Justice Vinson

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refers to the two early cases, NEW JERSEY STEAM NAVIGATION COMPANY v. MERCHANTS BANK and GREAT NORTHERN RAILROAD COMPANY v. O'CONNOR as upholding the rights of the holder of the forwarder's bill of lading to recover from the underlying rail carrier. But he states that:

> "The theory of these actions was that the shipper was the undisclosed principal of its agents, the forwarder, in the latter's contract with the carrier."

Petitioner does not construe the reference to these older cases by Chief Justice Vinson, decided long before the passage of the Freight Forwarder Act, as indicative of their decisiveness of the basic question involved in the case at bar under the Freight Forwarder Act as intended by Congress, **because such issue was not before the Supreme Court in the *Acme* case nor involved in the Foot Note itself.** Under the Act the freight forwarder now acts as a **Principal or independent Contractor,** not as an agent of the shipper as was the theory under which recovery was allowed in the MERCHANT BANK and O'CONNOR case.

The Supreme Court's decision in the ACME case must be interpreted in the light of the reasoning and language of the entire opinion and notwithstanding the ambiguity in Foot Note 27, we think it clear that in the case at bar there was no privity of contract between the owner of the freight and the rail line. As stated by the Supreme Court of Texas, in HOUSE v. HOUSTON WATER WORKS COMPANY, 31 S.W. 179:

> "As a general rule no person can sue upon a contract except he be a party to or in privity with it." See also in this connection CITY OF WICHITA FALLS v. SCHWARTZ, 57 S.W. 2d 236.

The transaction here involved is between the shipper,

American Abrasive Metals Company and the forwarder, Morgain Forwarding Company, covering an l.c.l. shipment. The transaction between the forwarder and the rail line covered a carload shipment which took a different rate and in some respects a different legal liability. The merchandise was shipped subject to the terms and provisions of the bill of lading and tariffs which were a part of the stipulations in this case, a higher rate not having been paid by the Morgain Forwarding Company under Rule I of CONSOLIDATED FREIGHT CLASSIFICATION NO. 16 to obtain the benefits of carriers liability "limited only as provided by the common law and by the laws of the United States and of the several States so far as they apply." The tariffs specifically provide that the carload rate was applicable only where the shipment was from a single consignor to a single consignee. *This provision cannot be ignored to the extent of splitting up the cause of action and permitting as many different suits against the rail lines as there were outstanding l.c.l. bill of lading of the forwarder to its customers.*

Conclusion

Petitioner is firmly of the opinion that it was the intention of Congress when it passed Part IV of the INTERSTATE COMMERCE ACT (Freight Forwarders Act), 49 USCA, Sec. 1001 et seq., that a less than carload shipper through a freight forwarder can look ONLY to such freight forwarder for the recovery of damages to said shipment. The ACME FAST FREIGHT case, distinguishes forwarders under the Act from those which formerly contracted as mere agents of the shippers (and by reason of such relationship shippers were then permitted to recover directly against the railroad). While recognizing the distinction between the types of forwarders, the ACME case is no authority for

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the basic question involved in this appeal since the same was neither briefed or argued in that case. Footnote 27 of the ACME FAST FREIGHT case, while citing the two earlier cases under which a recovery was allowed, is likewise pure obiter, designed to answer Footnote 17 of the Circuit Court of Appeals Decision in the ACME case, and the Honorable Court of Civil Appeals for the First Supreme Judicial District of Texas, erred in adopting Respondent's argument that this Footnote 27 recognizes and reaffirms the old doctrine that an l.c.l. shipper, through a freight forwarder, may still recover directly against the carrier as an undisclosed principal to the bill of lading issued to the freight forwarder by the initial carrier. Such a construction is directly contrary to the expressed intention of the Act made by Congressman Wolverton, the ranking minority member of the House Committee, in charge of the bill which later became Part IV of the INTERSTATE COMMERCE ACT.

WHEREFORE, Petitioner prays that this application for writ of certiorari be granted, and that upon final hearing the judgments of the trial court and the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, be reversed and judgment be here rendered for the Petitioner.

Respectfully submitted,

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Counsel for Respondent, Vinson, Elkins & Weems, Niels Esperson Building, Houston, Texas, have been furnished duplicate copies of this Brief on this the 26th day of May, A. D. 1953.

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APPENDIX "A"

Opinion of the Court of Civil Appeals

No. 12,474

GUY A. THOMPSON, TRUSTEE, INTERNATIONAL-GREAT NORTHERN RAILROAD COMPANY, Appellant,

vs.

AMERICAN ABRASIVE METALS COMPANY, Appellee.

Appeal from the District Court of Harris County

Appellee placed 480 kits of liquid paint with Morgain Forwarding Company, "a freight-forwarder", for shipment from Newark, New Jersey, to Texas. The paint was delivered to the "freight-forwarder" in good condition, and properly prepared for shipment. The "freight-forwarder" consolidated appellee's shipment, which was less than a carload lot, with other shipments, to make up a carload lot of mixed merchandise.

The "freight-forwarder" then placed the carload lot of mixed merchandise with the Baltimore and Ohio Railroad Company for shipment, the paint being delivered to it in good condition, and properly prepared for shipment.

The Baltimore and Ohio Railroad Company issued its Uniform Straight Bill-of-Lading to the "freight-forwarder." The bill-of-lading contained no agreed, or declared, value of appellee's paint, or of the entire carload of mixed merchandise. The Bill-of-lading provided that the carrier thereunder should be liable,—as at common law—for any loss or damage to the shipment, except the carrier should not be liable for any loss, or damage, caused by the act of God, the public enemy, the authority-of-law, or the act or default of the shipper, or owner, or for natural shrinkage.

The bill-of-lading contained no other limitation of the carrier's liability pertinent, under the facts of the case.

Either the initial-carrier, or a subsequent connecting common carrier by railroad, delivered the carload shipment, including appellee's paint, to appellant, in good condition and properly prepared for shipment, at or near Longview Junction, Texas, and appellant transported the goods from there to Houston, Texas.

Plaintiff's kits of paint were damaged during transportation on appellant's line. The damage was not the result of any negligence, or default, on the part of appellee, or the "freight-forwarder", by reason of any defect in the goods, by reason of the inherent nature of the goods, or by any act of God, of the public enemy, or of public authorities. Appellee sustained damage in the amount of $6,434.38.

Claim for the damage was duly and timely filed with appellant, and payment was refused.

The cause was tried before the court, on an agreed stipulation of facts. The court rendered judgment for appellee, against appellant, for the sum of $6,434.38.

The Trustee (that is, as affects this cause, he was Trustee for the International-Great Northern Railroad Company only, against which the trial court's stated judgment ran) appeals, presenting here 6 detailed Points of Error, which will be considered together, since appellant, himself, thus, does likewise, in his brief: All of appellant's points may be reduced to the basic question of whether, under the provisions of Part IV of the Interstate Commerce Act, 49 USCA, Sec. 1001, et seq., commonly known as the Freight-Forwarders Act, passed by Congress in 1942, a less than carload shipper, who holds a bill of lading from a freight-forwarder, whereby the forwarder agrees to cause said merchandise to be transported and delivered to a given destination, can recover directly from the underlying rail carrier

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for loss or damage to said merchandise, while the same is a part of a carload shipment made up of a number of individual less-than-carload shipments, and covered by a single railroad bill of lading, issued in favor of forwarder, as shipper, and showing the forwarder to be both consignor and consignee.

Appellant's detailed position and argument is that no such right of action lay under Part IV of the Interstate Commerce Act, 49 USCA, Sec. 1001, et seq., commonly known as the Freight-Forwarders Act, passed by Congress in 1942, as applied to the exact circumstances under which this shipment was made.

His boiled-down position is that prior to the passage of such act, one who occupied the position toward the owner of "freight-forwarder" in this instance, such shipper could recover directly from the carrier. Citing, among others, these authorities: New Jersey Steam Navigation Co. v. Merchants Bank, 6 How. 344, 379, 381, 12 L. Ed. 465 (1848); Great Northern Railway Co. v. O'Connor, 232 U. S. 508, 509, 34 S. Ct. 380, 58 L. Ed., 703; and Chicago, M. St. P. & Pac. R. Co. v. Acme Fast Freight, 336 U. S. 465; 69 S. Ct. R. 692.

He further urges, however, that since the most recent decision of the United States Supreme Court, pertaining to such Freight-Forwarders Act, that is, that in Chicago, M. St. P. & Pac. R. Co. v. Acme Fast Freight supra, no such direct recovery may longer be had.

In other words, his position is that the Supreme Court, in the Acme case, to quote his own language, "distinguishes forwarders under the Act from those which formerly contracted as mere agents of the shippers by reason of which relationship shippers were theretofore permitted to recover directly against the railroads. See Merchants Bank and O'Connor cases, supra. At page 484-485 of the opinion in

the Acme case." His further statement of such position is, thus, detailed at pages 10 and 11 of his brief:

"Thus it is that the type of 'freight-forwarder' encompassed by the Freight Forwarder Act does not act as the mere agent of the shipper, as under the early decisions, but as an independent contractor, or principal. When the Morgain Forwarding Company, in the case at bar, contracted with the Baltimore & Ohio Railroad Company for shipment of a carload lot of mixed merchandise to Houston, Texas, it did so not as an agent of the several unnamed and undisclosed less-than-carload shippers, including appellee in this case, but as a PRINCIPAL."

The appellee, on the other hand, thus states his opposing position,—that the trial court's judgment was correct—in these two counterpoints:

"I.

"A shipper, through a "freight-forwarder", may recover from a common carrier damaging the shipment, under the terms of the bill of lading issued to the "Freight-forwarder", as an undisclosed principal to such bill of lading.

"II.

"The goods having been delivered to appellant in good condition and properly prepared for shipment, and having been damaged in the course of their shipment by appellant, appellee was entitled to judgment against appellant for the full damages sustained by appellee, since the bill of lading issued to the "freight-forwarder" contained no declaration of value, or agreed value, or other applicable limitations on liability."

Under these presentments, the appellee urges that an owner's right to ship his goods through a "freight-forwarder" to recover directly against the carrier with whom the "freight-forwarder" has placed the goods, for loss of,

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or damage to the goods, has been recognized by the Supreme Court of the United States on an undisclosed principal or agency theory, since the year 1848, when that Court handed down its decision in the case of The New Jersey Steam Navigation Company v. The Merchants' Bank, 6 How. 344, 12 L. Ed. 465; indeed, he urges that such last-cited opinion of the United States Supreme Court recognized that such a recovery was available to the owner of such goods "either on the contract entered into between the "feight-forwarder" and the carrier, or, in a tort action, by the owner of the goods against the carrier for negligently damaging the same." In support of that position, he cites Great Northern Railway Company v. O'Connor, supra.

In the case at bar, no declared value, or agreed value, was placed on the shipment in the bill of lading issued by the carrier to the "freight-forwarder." Accordingly, under the holding in Great Northern Railway Company v. O'Connor, supra, the appellee was entitled to recover the full amount of damages sustained. In this connection, appellee differs widely from the appellant's construction of the holding of the U. S. Supreme Court in the cited Acme Fast Freight, Inc. case, using this language: "The United States Supreme Court, on the contrary, has clearly recognized that such a shipper, through a freight-forwarder, can recover directly against the carrier as an undisclosed principal to the bill of lading issued to the freight-forwarder by the carrier. In the Acme Fast Freight case, at 336 U. S. 486, 93 L. Ed. 830, in Footnote 27, the Court said, in part:

" 'Of course, shippers by freight-forwarder have for many years been permitted to sue underlying carriers for loss, or damage, occasioned by the latter. New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. (U.S.) 344, 12 L. Ed. 465 (1848); Great Northern R. Co. v. O'Connor, 232 U.S. 508, 58 L. Ed. 703, 34 S. Ct. 380, 8 NCCA 53 (1914).

The theory of these actions was that the shipper is the undisclosed principal of its agent, the forwarder, in the latter's contract with the carrier. The Forwarder, as agent of an undisclosed principal, could, of course, sue on the contract. Merchant Shippers Asso. v. Kellog Exp. & Drayage Co., 28 Cal. (2d) 594, 170 P. (2d) 923. See Bunge Draymen, Freight Forwarders and Warehousemen, p. 117. See also Am. L. Inst. Restatement, Agency, Vol. 2, Sections 322, 364.'"

He further points out, however, in that connection that, while under the Acme Fast Frieght case the shipper has no independent tort action for negligence against the carrier transporting the goods under the bill of lading issued to a "freight-forwarder," he did have a right of action, however, on the bill of lading. He ends his argument upon that contrary construction with this conclusion: "Therefore, appellee, in the present case, could maintain an action upon the bill of lading issued to Morgain Forwarding Company, the freight-forwarder, directly against the appellant-carrier, who damaged appellee's paint while transporting it under such bill of lading."

This Court concludes that the trial court properly construed the appellee's right, and that no successful attack has been made by appellant upon the amount of the judgment so rendered in his favor. These conclusions require an affirmance of the judgment. It will be so ordered.

Affirmed.

/s/ GEO. W. GRAVES,
Associate Justice.

Judgment rendered and opinion filed November 20, 1952. (Opinion reported at 253 S.W. (2d) 83.)

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